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Supreme Court, U.S.
FILED
JUL 30 1999
OFFICE OF THE CLERK

No. 99-49

IN THE

Supreme Court of the United States

THOMAS J. CLEARY, by his next friend, Carolyne Cleary; CAROLYNE CLEARY, individually, on their own behalf and on behalf of all other persons similarly situated,

Petitioners,

v.

WILLIAM WALDMAN, in his official capacity as COMMISSIONER OF NEW JERSEY DEPARTMENT OF HUMAN SERVICES; LEONARD FISHMAN, in his official

(*Caption continued*)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT NEW JERSEY ASSOCIATION OF HEALTH-CARE FACILITIES

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capacity as COMMISSIONER OF NEW JERSEY DEPARTMENT OF HEALTH AND SENIOR SERVICES; VELVET MILLER, in her official capacity as DIRECTOR OF DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES; MARK SCHIFFER, in his official capacity as DIRECTOR OF PASSAIC COUNTY BOARD OF SOCIAL SERVICES,

NEW JERSEY ASSOCIATION OF HEALTH-CARE FACILITIES; NEW JERSEY ASSOCIATION OF NON-PROFIT HOMES FOR THE AGING, INC.,

Respondents.

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STATEMENT OF THE CASE

Petitioners here challenge the decision of the United States Court of Appeals for the Third Circuit in *Cleary ex rel. v. Waldman*, 167 F.3d 801 (3d Cir. 1999). The Third Circuit held in *Cleary* that New Jersey may apply the "income first" rule, rather than the "resource first" rule, in determining the amount of resources that a community spouse must "spend down" before his or her institutionalized spouse becomes eligible to have the cost of his or her nursing home care paid for by the New Jersey Medicaid program.

The right of a state to choose to employ *either* the income first rule or the resource first rule has been endorsed by both of the federal agencies charged with administering the federal government's participation in each state's Medicaid program. Those endorsements have been subsequently upheld in well-reasoned decisions by the Courts of Appeal in both the Third Circuit and the Sixth Circuit, the only two federal intermediate appellate courts that have to date considered and ruled on this issue. More importantly, this Court recently reviewed — and denied — the Petition for a Writ of *Certiorari* filed in the Sixth Circuit case.

Despite all this, Petitioners now ask this Court to grant the Petition, reverse the Third Circuit's decision in *Cleary* and require New Jersey to apply solely the resource first rule. For the reasons set forth below, Respondent, New Jersey Association of Health-Care Facilities ("Respondent"), submits that the *Cleary* decision does not warrant review, much less reversal, by this Court and respectfully asks this Court to summarily deny the Petition.

REASONS FOR DENYING THE WRIT

I.

THIS COURT HAS ALREADY FULLY CONSIDERED, AND DECLINED TO REVIEW, THE QUESTION PRESENTED IN THE PETITION.

The exact legal question posed in the Petition was previously submitted to this Court on August 25, 1998 in the Petition for a Writ of *Certiorari* filed in *Chambers v. Ohio Dep't of Human Serv.*, 145 F.3d 793 (6th Cir. 1998), *cert. denied*, __ U.S. __, 119 S. Ct. 408 (1998). In *Chambers*, a class action suit challenging the application by the Ohio Department of Human Services of the income first rule, the Sixth Circuit reversed the federal district court's holding that the Medicare Catastrophic Coverage Act (the "MCCA") mandates the use of the resource first rule. *Chambers*, 145 F.3d at 804. On November 2, 1998, this Court denied the *Chambers* Petition, a fact conspicuously absent from the *Cleary* Petition.

The reasoning of the Sixth Circuit in *Chambers* not only presaged the reasoning of the Third Circuit in *Cleary*, but the Sixth Circuit also cited extensively, with favor, to the district court's opinion in *Cleary* which was subsequently reviewed and affirmed by the Third Circuit. Therefore, there is no legal question raised here that could in any way alter this Court's prior determination in *Chambers* that the grant of *certiorari* is not warranted to review the current state of law which upholds a state's right to choose between the income first and the resource first approaches.

In addition, there has been no applicable intervening amendment to the MCCA or to its federal or New Jersey implementing regulations that might cause this Court to question its decision in November 1998 to decline to review this issue. Nor has there been a change in the stated policy positions of both the Health Care Financing Administration ("HCFA") and the United States Department of Health and Human Services ("HHS"), the agencies charged with administering the federal government's participation in each state's Medicaid program, specifically endorsing the right of a state to choose to apply either the income first rule or the resource first rule.

Finally, the factual circumstances in *Cleary* are, if anything, less compelling than those in *Chambers*. In the latter case, the application of the resource first rule would have permitted one of the named claimants to have sheltered $97,000 in resources from the Medicaid "spend down" rules, compared with $72,660 under the income first rule. *Chambers*, 145 F.3d at 800 n.12. In *Cleary*, as noted by the federal district court, the application of the resource first rule would enable the plaintiffs to shelter assets in excess of $243,000, compared with $76,740 under the income first rule. *Cleary ex rel. v. Waldman*, 959 F. Supp. 222, 227-28 (D.N.J. 1997), *aff'd*, 167 F.3d 801 (3d Cir. 1999).

In short, it is clear that this Court has already determined that the single legal question raised in the Petition does not warrant further review. Because nothing has occurred in the brief intervening period that could have affected this Court's reasoning in *Chambers*, the fact of this Court's prior decision on the *Chambers* Petition is, in and of itself, sufficient to justify the denial of the *Cleary* Petition.

II.

THE RIGHT OF THE STATES TO CHOOSE BETWEEN THE INCOME FIRST RULE AND THE RESOURCE FIRST RULE DOES NOT INTERFERE WITH THE UNIFORM PROTECTION SOUGHT BY THE SPOUSAL IMPOVERISHMENT PROVISIONS OF THE MEDICAID CATASTROPHIC COVERAGE ACT OF 1988.

Petitioners argue that the current state of the law that permits states to select either the income first rule or the resource first rule interferes with the goal of the MCCA to establish a "uniform national spousal protection policy that applies in all States" which participate in the Medicaid program. H.R. Rep. No. 105(II), 100th Cong., 2d Sess. 4 (1987), *reprinted in* 1988 U.S.C.C.A.N. 857, 892 (the "House Report"). This assertion is unfounded.

The Medicaid program is "a cooperative federal-state venture in which states operate programs of their *own design*", subject to federal standards and regulations. *Cleary*, 167 F.3d at 805 (emphasis added). Consistent with this principle and in order to promote the integrity of the Medicaid program, the federal government affords the states maximum flexibility in meeting the equally important, yet competing, goals of the MCCA: to prevent the pauperization of the community spouse during the period his or her spouse is institutionalized, while at the same time ensuring that couples use a fair share of their own resources to pay for the institutionalized spouse's nursing home care. House Report, at 65; *see also Cleary*, 959 F. Supp. at 229 ("The states have considerable freedom to adopt standards for determining the extent of medical assistance, as long as such standards are reasonable and consistent with the objectives of the [Medicaid] Act.").

The MCCA was carefully drafted in recognition of the compelling public interest that requires states to "preclude couples who possess[ ] substantial resources from qualifying for Medicaid" in order to properly apportion their limited resources and meet their obligations to the medically indigent, as well as the elderly. *Cleary*, 167 F.3d at 805. Moreover, because it is an entitlement program, the Medicaid program is charged with taking all necessary measures to ensure that the implementation of the MCCA does not "facilitate the transfer of accumulated wealth from nursing home patients to their non-dependent children." House Report, at 73. The use of the income first rule is an option available to the states to assist them in achieving the delicate balance of preventing the impoverishment of those who currently have resources without depriving the indigent of their right to medical care.

HCFA and HHS also recognize the need to provide states with substantial latitude in order to enable them to meet the goals of the MCCA. These agencies have repeatedly stated their position that, unless and until federal regulations are formally adopted to mandate a single approach, states are free to elect to apply either the income first rule or the resource first rule. *See Cleary*, 167 F.3d at 806-07 and n.3 (citing HCFA State Medicaid Manual, HCFA-Pub. 45, § 3262.3; HCFA Memorandum from Medicaid Bureau Director Sally Richardson (March 1994); Letter from HCFA to Pennsylvania Department of Public Welfare (April 1994); and Letter from Donna E. Shalala, HHS, to George V. Voinovich (March 1996)).

Far from creating a "patchwork of radically different applications of the law" as Petitioners contend, permitting states to choose either rule is also consistent with the

flexibility intentionally built into the other provisions of the MCCA, including the right of each state to establish, within statutorily defined upper and lower limits: (i) the amount of the minimum monthly needs allowance for the community spouse, 42 U.S.C. § 1396r-5(d)(3)(A); (ii) a personal needs allowance for the institutionalized spouse, 42 U.S.C. § 1396r-5(d)(1)(A); (iii) a family allowance for each family member of the institutionalized spouse, 42 U.S.C. § 1396r-5(d)(1)(C); and (iv) the community spouse resource allowance, 42 U.S.C. § 1396r-5(f)(2). The availability of the income first rule, along with the discretion to establish the allowances described above, maximizes the ability of each state to fashion and implement, again within circumscribed limits, Medicaid rules and regulations in order to protect community spouses while preventing couples from manipulating the Medicaid program in order to preserve hundreds of thousands of dollars in assets for the benefit of their heirs, but at the expense of the taxpayers.

For these reasons, it is clear that allowing states the option of whether to implement the income first rule or the resource first rule both advances the intent of the MCCA and fits neatly within the statutory scheme. By providing states with the discretion to adopt either approach, Congress has given states the necessary flexibility to meet all of their obligations under the entire Medicaid program in general and the MCCA in particular.

III.

THE THIRD CIRCUIT COURT HAS CORRECTLY INTERPRETED THE FEDERAL LAW AT ISSUE.

The Third Circuit (and the district court below) correctly analyzed the facts and the law in *Cleary* and rendered a soundly reasoned and clearly articulated decision upholding New Jersey's use of the income first rule. All of the parties to this matter agree that the single critical issue is whether the term "community spouse's income" as used in the section of the MCCA governing revisions to the community spouse resource allowance (the "CSRA Provisions"), 42 U.S.C. § 1396r-5(e)(2)(C), means only the community spouse's personal income under the "name on the check rule" or whether it means all of the income available to the community spouse, including that portion of the institutionalized spouse's income attributed to the community spouse under 42 U.S.C. § 1396r-5(d)(1)(B). *See Cleary*, 167 F.3d at 806.

The Third Circuit adopted the district court's conclusion that, due to the complexity of the MCCA and its interlocking provisions, the definition of "community spouse's income" in the CSRA Provisions is ambiguous and requires an examination of legislative intent, as well as an analysis of the deference to be afforded the interpretation offered by HHS and HCFA. *Id.* at 807. The Third Circuit found that the availability of the income first rule not only "conforms to the language of the statute, to its legislative history and the purpose for which it was enacted", but is also a reasonable interpretation by HCFA and HHS of the intricate MCCA scheme and thus entitled to deference. *Id.* at 811-12. Based on this analysis, the Third Circuit affirmed the district court's decision that New Jersey is entitled to employ the income first rule. *Id.* at 812.

Petitioners have not raised even a single credible argument that would support a further review by this Court of the *Cleary* decision, let alone its reversal. First, Petitioners argue that the meaning of the term "community spouse's income" as used in the CSRA Provisions is *not* ambiguous. This is despite the fact that, as Petitioners admit, the very question of what that term actually means has spawned numerous lawsuits including the instant matter. It is obvious that, as used in the MCCA, the term "community spouse's income" has different meanings and includes various components of "income" depending on its context. *Id.* at 807.

The CSRA Provisions provide for an increase in the CSRA if it is established that the CSRA "is inadequate to *raise the community spouse's income* to the [MMMNA]." 42 U.S.C. § 1396r-5(e)(2)(C) (emphasis added). Petitioners urge that "community spouse's income" should be read here to include only that income attributed to the community spouse under the "attribution of income rules", 42 U.S.C. § 1396r-5(b)(2). However, as both decisions below in *Cleary* point out, the attribution of income rules apply expressly by their terms to the rules governing the protection of income for the community spouse, 42 U.S.C. § 1396r-5d, but do not expressly apply to the CSRA Provisions. As a result, Petitioners' argument to the contrary is unpersuasive.

Petitioners also attack the deference properly accorded by the Third Circuit to the interpretations, albeit informal, adopted by HCFA and HHS with regard to the availability of both the income first rule and the resource first rule. Although HCFA corrected a directive in a regional letter that indicated the income first rule is *required* by the MCCA, neither HCFA nor HHS has ever taken a position other than that the use of the income first rule is, at the very least, permissible under the MCCA.

Federal courts are required to defer to a federal agency's reasonable interpretation of a statute over which it has administrative and rule-making authority. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). Even informal agency interpretations are entitled to deference where, as here, they "are made 'in pursuance of official duty, based upon more specialized experience and broader investigation and information than is likely to come to a judge.' " *Cleary*, 167 F.3d at 807-08 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). Thus, the deference owed — and given — here by the Third Circuit to the informal pronouncements of HCFA and HHS provides further support for the ruling permitting New Jersey to apply the income first rule in implementing the MCCA.

Finally, Petitioners' citation to a statement by Senator Mitchell as support for the proposition that Congress intended to mandate the use of the resource first rule cannot go unchallenged. Senator Mitchell's remarks accompanied his introduction of S. 1127 (the "Senate Bill"), the proposed Senate version of the MCCA. 133 Cong. Rec. 29,356 (1987). The Senate Bill was modeled after H.R. 2470 (the "House Bill"), the first bill introduced into Congress that embodied the spousal impoverishment provisions which, as modified, would become the MCCA.

The House Bill did not provide for an upward adjustment of the CSRA as the result of a fair hearing. Instead, it made only the following sources available to the community spouse in meeting the MMMNA: (i) the community spouse's own income; (ii) any income generated by the CSRA; and (iii) transfers of income from the institutionalized spouse. H.R. Conf. Rep. No. 661, 100th Cong., 2d Sess. (1988), *reprinted in* 1988 U.S.C.C.A.N. 923, 1039 (the "House

Conference Report"); *see Cleary*, 959 F. Supp. at 233. The Senate Bill, on the other hand, included a provision that increased the CSRA in the event that the community spouse's own income was insufficient to meet the MMMNA, regardless of any income of the institutionalized spouse that might be available for transfer to the community spouse. House Conference Report at 263-64; *see Cleary*, 959 F. Supp. at 233.

The compromise version of the MCCA ultimately enacted by Congress rejects that portion of the Senate Bill which "excludes from countable resources those assets necessary to produce income available to the community spouse." House Conference Report at 265. Instead, it permits either spouse to request a fair hearing on whether the CSRA is adequate to generate sufficient income to raise the community spouse's income to the MMMNA.

> If the State, after such a hearing, determines that the [CSRA] is inadequate the State must allow the community spouse to retain an adequate amount of resources to provide the [MMMNA] (*taking into account any other income attributable to the community spouse*), notwithstanding the amount of the State established resource allowance. [*Id.* (emphasis added).]

The requirement that the state take into account "any other income attributable to the community spouse", particularly when read in the context of the revisions to the original bill, can most logically and fairly be interpreted to include any of the institutionalized spouse's income that has been attributed to the community spouse under the MCCA.

This offers strong evidence for the proposition that Congress intended, at the very least, that states be permitted to employ the income first rule. Senator Mitchell's remarks, which could be construed to require the application of the resource first rule, made as they were in connection with provisions of the bill that were rejected in the final version of the MCCA, undermine, rather than support, Petitioners' position.

In summary, the Third Circuit's decision in *Cleary* is firmly grounded in both the language and the legislative history of the MCCA. The *Cleary* decision is also in harmony with the interpretation of the MCCA that has been endorsed by both HCFA and HHS. In light of these facts, it is abundantly clear that the issue set forth in the Petition does not warrant this Court's review.

CONCLUSION

This Court has already determined in *Chambers*, a case virtually identical to *Cleary*, that the issue raised in the Petition does not merit the grant of *certiorari*. Nothing has occurred in the interim that would tend in any way to alter this Court's prior determination. For that reason alone, Respondent respectfully submits that the Petition be denied.

Moreover, even in the absence of this Court's prior decision to deny the *Chambers* Petition, there is no doubt that the reasoning of the Third Circuit in *Cleary* is consistent with the language, legislative intent and spirit of the MCCA. In addition, the stated policies of each of the federal agencies having jurisdiction over the administration of the Medicaid program are in complete accord with the *Cleary* decision. For these reasons, Respondent respectfully submits that this Court should deny the Petition for Writ of *Certiorari*.

Respectfully submitted,

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